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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (S. A. 185–198) [1] has not yet been reported. The opinion of the district court overruling a demurrer to the first indictment (A. 111) is reported at 47 F. Supp. 421. Other opinions of the district court on the admissibility of certain exhibits offered by the Government (A. 216) and denying a motion for a directed verdict at the close of the Government's case (A. 227) are not officially reported.

JURISDICTION

The judgments of the circuit court of appeals were entered December 1, 1944 (S. A. 198–206). A petition for rehearing was filed on January 15, 1945 (S. A. 207–226). On January 26, 1945, and February 24, 1945, the circuit court of appeals entered orders amending its opinion (S. A. 227–228), and on February 28, 1945, entered an order denying the petition for rehearing (S. A. 229–230). The petitions for writs of certiorari were filed April 4, 1945. The jurisdiction of this Court

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[1] Petitioners' appendix in the court below is designated as "A."; petitioners' supplemental appendix in this Court is designated as "S. A."; the Government's appendix is referred to as "R."

is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 27, 1934.

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to establish the scheme to defraud alleged in the indictments and to show the participation therein of the petitioners convicted on the second indictment.

2. Whether the use of the mails and instrumentalities of interstate commerce to report progress of security selling activities and to remit the proceeds of sales, constitute a violation of Section 17 (a) of the Securities Act of 1933, where such activities were part of a scheme to defraud.

3. Whether the trial judge improperly withdrew from the jury the question whether the documents alleged to have been sold were securities within the purview of the Securities Act.

4. Whether statements made by certain of the petitioners to an internal revenue agent on condition that the agent would not cooperate in a pending Securities and Exchange Commission investigation constituted inadmissible confessions obtained by inducement of reward.

STATUTES INVOLVED

Section 215 of the Criminal Code (18 U. S. C. 338) provides in pertinent part as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud,

> or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

The Securities Act of May 27, 1933, c 38, Title 1, 48 Stat. 74 (15 U. S. C. 77), provides in part:

> SEC. 2. (1) [as amended, 48 Stat. 905] The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable

share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

* * * * *

SEC. 17. (a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud * * *

* * * * *

SEC. 24. Any person who willfully violates any of the provisions of this title * * * shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined

not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

In May 1942, in the United States District Court for the District of Delaware, an indictment in 25 counts was returned against the petitioners H. B. Monjar, Josephine Monjar, Cook, Jones, and Drew (A. 1, 19–95). Seventeen substantive counts (Nos. 1–15, 23, 24) charged use of the mails in execution of a scheme to defraud (A. 19–74, 87–92); counts 16–22 charged the employment of a scheme to defraud in the sale of securities by use of the mails and instrumentalities of interstate commerce, in violation of Section 17 (a) of the Securities Act (A. 74–87); and count 25 charged conspiracy to violate the mail fraud statute and the fraud provisions of the Securities Act (A. 92–95).

The scheme to defraud, outlined in detail in the indictment, charged in substance that the defendants would, in 1928, form an organization known as the Mantle Club; that in 1933 they would expand the Club into a nation-wide organization (A. 20–22); that members of the Club would be told of Monjar's business ability and would subsequently be solicited to make personal loans to Monjar, in the course of which numerous false representations would be made to them (A. 24–35, 40–42); that a corporation known as the Key Publishing Company would be established

to publish a magazine and books containing articles written by Monjar which would be sold to members of the Mantle Club (A. 23); that with funds obtained through personal loans the defendants would establish various corporate enterprises in which they would be officers and stockholders, including the Golden Braid Costume Company, which would manufacture costumes for Mantle Club members and sell an excessive number of such costumes to the Club (A. 36–40); that the defendants would cause the Mantle Club to pay to them large salaries, bonuses and travel expenses (A. 40).

The other petitioners were subsequently indicted in September 1942 in one count for conspiracy to violate the mail fraud statute and the fraud provisions of the Securities Act, the nature of the scheme to defraud being the same as that alleged in the first indictment, with the addition of nine paragraphs relating to the activities of some of these petitioners in endeavoring to liquidate personal loans made to Monjar (A. 17, 96–106).

On stipulation of counsel, the two indictments were tried together (A. 2). On the first indictment there was a directed verdict for the defendants on counts 1, 4, 9, 19 and 22 (A. 734). The petitioners named in that indictment, with the exception of Josephine Monjar, were convicted on all the other counts (A. 8). Hugh B. Monjar was sentenced to imprisonment for 5 years on

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count 2 and one year on each of the other counts, to run concurrently with the sentence on count 2, and to pay a fine of $1,000 on each of 14 mail fraud counts, $5,000 on each of the 5 Securities Act counts, and $10,000 on the conspiracy count, the total sentence amounting to 5 years' imprisonment and $49,000 in fines (A. 9–10). The other petitioners convicted on the substantive counts of the first indictment were each sentenced to imprisonment for 3 years on count 2 and to concurrent prison terms of lesser degree on other counts, and to pay cumulative fines of $1,000 each on 5 of the substantive counts (A. 10–11). Mrs. Monjar was convicted on the conspiracy count (A. 8) and sentenced to imprisonment for eighteen months and to pay a fine of $10,000 (A. 11). On the second indictment the jury returned a verdict of guilty with a recommendation of mercy as to all petitioners named therein (A. 8). Petitioners Lindh and Willard were each sentenced to 18 months' imprisonment and to pay a fine of $1,500. Petitioners Moore, Fitzpatrick, Cruser, and Candlin were each sentenced to imprisonment for one year and one day and to pay a fine of $1,000. Maddams was sentenced to 6 months' imprisonment and to pay a fine of $500. As to all these petitioners, execution of the prison sentences was suspended and they were placed on probation for 2 years on condition that the fines be paid and petitioners sever all relations as employees of the Mantle Club or any affiliated cor-

porations. It was specifically stated that cessation of membership in the Mantle Club was not a condition of probation. (A. 12–14.) On appeal, the circuit court of appeals affirmed all the judgments of conviction (S. A. 198–201).

The evidence for the Government in respect of the scheme to defraud[2] may be summarized as follows:

Background of Monjar's activities.—In October 1924, in San Francisco, petitioner Hugh B. Monjar organized a group known as the Decimo Club, the expressed purpose of which was the procurement of justice and financial betterment for its members (R. 1449). By 1927 the Club had spread to 34 cities and claimed a membership of 62,000 (R. 1450). Monjar originally received all, and subsequently part, of the $20 initiation fees paid by persons joining the organization (R. 1449). Monjar also organized and controlled the Apasco Purchase and Sales Corporation, the subscribers to which were offered an opportunity to purchase merchandise at discounts (R. 1116–1117, 1451). The right to subscribe to the Apasco service was limited to members of the Decimo Club (R. 1117). In 1927 dissension developed in the Decimo Club prior to its annual convention. Litigation ensued

[2] No question is raised as to the sufficiency of the evidence to establish use of the mails in respect of the mail fraud counts. The legal question as to the sufficiency of the mailings under the Securities Act counts is discussed in Point II of the Argument, *infra*.

and both the Decimo Club and the Apasco Corporation disappeared as active organizations. (A. 494–499; R. 1453–1454.)

In 1928, in New York, Monjar organized a corporation known as H. B. Monjar, Inc., the purpose of which was to render vocational guidance to those who subscribed to its services (R. 1118, 1199, 1213–1214, 1455). As a result of adverse publicity by metropolitan newspapermen who attended its meetings, the corporation ceased to function (R. 1220, 1455). Thereafter Monjar organized a similar corporation known as the Business Executives Association (A. 554–555; R. 1200). He also formed the Holare Corporation which offered a service similar to that previously given by the Apasco Corporation (R. 1200–1201). Subscribers to H. B. Monjar, Inc. were given the "opportunity" to purchase stock in the Monjar company and were also invited to make loans to Monjar which it was asserted would result in substantial financial returns (A. 551, 568–569; R. 1201, 1203–1205, 1216–1217).

The Mantle Club.—In January 1928, while H. B. Monjar, Inc. was still in operation, one Robinson wrote to Monjar stating that a group of men desired to form a national organization and that, knowing of Monjar's vast experience, they wished him to assume chairmanship of a club to be organized on autocratic lines (A. 454–455). Monjar replied that he would accept leadership only if he

were permitted to have around him "the tried and trusted men" who had been of value to him in the past and who had been trained by years of experience (A. 455–456). A group of seven men, among whom was petitioner Cook, immediately accepted these conditions (A. 456; R. 1744). Due to discussion in respect of the nature of the constitution, and to the fact that Monjar and his associates were occupied with the Decimo Club litigation and the activities of H. B. Monjar, Inc., the Mantle Club was not formally organized until January 17, 1929 (A. 457–458). Both prior to and after its organization Monjar would meet with a group of men at least once a week and deliver talks (A. 562–563; R. 1120). The Mantle Club remained a small organization with a membership of about 125 until 1933 (A. 458–460). During this period there were no regular dues but there were assessments based on expenditures and at times various members loaned money to Monjar (A. 459, 563; R. 1182, 1219–1220, 1234). The Club had a board of governors of nine men (R. 1121). Included in this original group were a number of the present petitioners (A. 420, 423–424; R. 1232).

In 1933 it was decided to expand the Mantle Club into a national organization (A. 459, 556, 571). The board of governors was reduced from nine to three men, was made self-perpetuating, and given autocratic control (A. 466, 481; S. A. 56; R. 1745). Monjar, Cook, and Jones consti-

tuted the three-man board (A. 403, 472; R. 116, 1745). Under the new arrangement, the Club established 30 units in various parts of the country (A. 527; R. 1506), each under the jurisdiction of a local board of governors appointed by the national board (R. 68–69, 241–250). In 1940 the constitution was amended to provide for election of the local boards of governors by "full" members from a slate prepared by the local board (R. 250–251) and also for election of a representative to a national council, which in turn elected a ten-man board of governors (A. 367, 481). The initiation fee of $20 received from each member was remitted to the national board of governors, which had its headquarters at Wilmington, Delaware (R. 1414). Of the monthly dues of $2 per member, 50% was retained by the local board and 50% remitted to the national board (R. 342–343). Except in emergency situations, the local board of governors was authorized to make only such expenditures as were approved by the national board in a budget submitted to the national officers (R. 343).

Upon joining the Club a member was invited to an "investigation" meeting at which he would be told of Monjar's prior activities in the Decimo Club, of his great success, and of the opposition he had encountered (R. 240–241, 1169, 1412–1425, 1449–1456). After this recital a recess would be called and members were told that they were

free to withdraw if they wished. In subsequent "assimiliation meetings," the new members were instructed in the purposes of the Mantle Club and were told of Monjar's great business acumen. They were informed that sometime in the future those who proved themselves worthy would be rewarded by being offered an opportunity to share in Monjar's business plans. At all meetings of the Club, Monjar's abilities were stressed and members were exhorted as to the necessity of complete loyalty and confidence in Monjar. It was emphasized that participation in Monjar's business plan was separate and apart from membership in the Club but that Monjar intended to reward worthy men. (R. 243–247, 607, 677–678, 844–847, 1198–1199, 1210–1211, 1218, 1222, 1231, 1239, 1241, 1273.) Until 1940 members were given certificates stating that they had earned "co-points" for faithful attendance at meetings, payment of dues, etc., and were told that the certificates were valuable, although the reason for such value was never explained (R. 138–139, 143, 307–309, 499, 637–638, 696, 769, 783, 807–808, 845, 1269).

Each member of the Mantle Club was placed in a group of 10 under a captain, each group of 10 captains under a division head, each group of 10 division heads under a section head, and each district under the local board of governors (R. 66–67, 243–245). Each member was required to "con-

tact" his captain at least once a week (R. 71–72, 244) and was required to attend the official monthly meeting of his local unit (R. 84, 239). The monthly meetings always included an address based on Monjar's writings and the reading of Monjar's current article (R. 78–79, 82–83). During a recess in the meeting dues would be collected through the "contact structure" of the Club, each member paying dues to his captain, and the captains passing the money to the division heads, who in turn passed it on to the section heads (R. 76–77). In addition, there were numerous other meetings which members were "privileged" to attend, and meetings of the various captains, division heads, and section heads (R. 71–72, 83–84, 239–240, 772, 892). Members would be notified of meetings through the "contact structure" of the Club, each man in authority being responsible for notifying the 10 men directly under him (R. 72).

Personal loans.—In 1934, shortly before the organization meeting of the Oakland, California, unit, the first outside of the metropolitan New York area, Monjar wrote to petitioner Drew (Ex. 254; R. 1638–1641; see R. 1748–1751) instructing him to advise persons chosen from the proposed membership that they were to be given an opportunity to make personal loans to Monjar ranging from $3 to $20 a month for 10 months, "each man to profit * * * from the extent of the

money that he advances" (R. 1638–1639). Monjar stated that the money was to be used to pay him a salary of $3,000 per month, $500 of which was to be used by him for office expenses; that "I am merely trying to get back on a sound basis, where no one could conceivably criticize the source of my income and where I would have the means of making it extremely profitable for those who helped in this particular manner" (R. 1640). Drew decided that it would be "dynamite" to mention the salary expected (R. 1432) and did not refer to this condition (R. 1682–1683). He succeeded in getting 66 men to agree to make the loans (R. 1432–1433). There was thus initiated the system of personal loans which continued until 1942 (R. 1507, see R. 1765).[3] Certain members would be notified, through the "contact structure" of the Club, to attend a special meeting (R. 480–481, 489, 554, 566, 652, 878, 926). After the persons so chosen were assembled, they would be told that the meeting was not a Mantle Club meeting (R. 358–359, 469, 526), that those present had been selected because they had proved themselves worthy, and that they were about to be honored by being afforded the opportunity to make personal loans to Monjar (R. 359, 409–410, 506, 686, 857). It was explained that the loans were unusual, that the borrower fixed the

[3] The last two loans were called "C. D." instead of "P. L." loans (R. 268, 871).

conditions, that the loans were limited to sums ranging from $30 to $200 payable in 10 months in installments, and that Monjar could do what he pleased with the money (R. 259, 362, 506, 539, 555, 930). In later years, among the old established units on the west coast, where personal loans had been an annual event for some time, Monjar himself addressed the meetings and made promises of financial security which would result from the loans, such as statements that the lenders would receive an income of $250 a month at some time commencing in the near future, and that their financial independence had been assured (R. 366, 372–373, 411, 429, 483, 519, 528, 571, 654, 787, 805). Petitioner Drew spoke at almost all of the personal loan meetings (R. 356, 365, 490, 493, 517, 556, 569, 584, 652, 686, 1216, 1249, 1680–1683, 1688, 1690).

In Portland and Seattle Monjar issued friendship bonds of which he stated there were eventually to be 50 series. He represented that when a member had received No. 50 he would have an income of $250 per month. (R. 483–485, 490–493, 633–635, 697–698, 731, 740–741, 766–767, 775, 783, 791–793, 809–814, 821–823, 833.)

After the loans were solicited a member of the local unit of the Mantle Club would be appointed Monjar's P. L. (personal loan) agent (R. 925–931; R. 1688), usually serving without compensation (R. 1688–1689). Collections were made at

the official monthly meetings of the Mantle Club (R. 579, 585, 653, 866, 1472). Each P. L. agent gave a receipt for the money collected, signed by the agent (R. 419–420, 271–276, 1696–1697). These receipts constituted the securities referred to in the Securities Act counts of the indictment. The agent would purchase a cashier's check or draft payable to Cook with the money thus received and would send such draft to Cook by mail, together with a report of collections (R. 255–256, 596–597, 866, 1688). Cook was in charge of all records in connection with personal loans (R. 1506–1507).

From 1934 to 1942 personal loans to Monjar, excluding amounts repaid to members who withdrew from the Club, amounted to approximately a million dollars (R. 1765–1767, 1769). Various expenditures from this fund are set forth in detail in Government's Exhibit 294 (R. 1768–1771). They include such items as $471,661.20 withdrawn by checks to the order of H. B. Monjar and to cash, $118,000 paid to Monjar's former wife as separate maintenance and as a property settlement at the time of divorce, $12,000 to Tiffany & Co. for the purchase of jewelry, $2,000 for flowers, and $200,000 for taxes.[4]

Key Publishing Company.—In 1933, prior to the expansion of the Mantle Club, the Key Pub-

[4] The taxes were upon income derived from the Apasco Corporation, not for any venture connected with the Mantle Club (see Ex. 218, not printed).

lishing Company was organized to publish a magazine containing Monjar's messages (A. 460–461; R. 23–24). The corporation had an authorized capitalization of 1,000 shares of a par value of $1 (R. 23, 25). Approximately four hundred dollars was subscribed, and with this sum publication was commenced (A. 462; R. 81). Jones was president, Cook vice-president and treasurer of the company, and Monjar was its managing editor (R. 23–24, 39). Until 1938 Monjar received a salary for his services and Jones and Cook as officers also received salaries in varying amounts (R. 1807). In December 1937 the company published a collection of Monjar's essays under the title "The Code of Ethics." Monjar received $1 royalty per book and at that time he declined further to accept a salary as managing editor of the magazine. (R. 32–35.) Later a supplement to the Code of Ethics was issued for which Monjar also received a royalty of $1 per book, subsequently reduced to twenty cents per book on both the Code and supplement (R. 37–38).

The Key magazine was sold to members of the Mantle Club through distributors originally chosen from the membership and subsequently incorporated (R. 29, 38). In 1941 the Key Publishing Company entered into a contract with the American Distributing Corporation, of which petitioner Drew was president, by which the latter company would solicit orders for the magazine at a commission (R. 1322–1325). It was the prac-

tice of the national board of governors of the Mantle Club to purchase a major part of the output of the Key Publishing Company at the wholesale price of 15 cents per copy and then resell copies to the Key Publishing Company as the latter needed them (R. 58–65). For example, in the year 1937 the Mantle Club purchased 240,000 current issues and 207,947 back issues and resold to the Key Publishing Company 40,247 issues (R. 1366). During the years from 1933 to 1942 approximately four million copies of the magazine were published, but only a little more than two million were sold by distributors (R. 1364–1365). The Mantle Club in that period purchased 1,165,388 copies and resold to the publishing company 274,432, leaving 890,956 undistributed copies in the hands of the Mantle Club (R. 1365–1366). Many of the magazines never left the warehouse of the Key Publishing Company (R. 100–101). As of December 31, 1941, the Mantle Club carried among its assets an item of $133,306.35 worth of the magazine, the "American Key" (R. 1783).

The Key Publishing Company paid substantial dividends on its $1 par value stock (R. 1346–1357). In the year 1940 the dividends amounted to $35 per share (R. 1350–1351). All the petitioners except Monjar and Mrs. Monjar participated in these dividends (R. 1794–1803).

The Golden Braid Costume Company.—In 1936, from money received from personal loans, Monjar gave to Mrs. Josephine T. Drew, who later became

Mrs. Monjar, and to his sister, Mrs. Mason, the sum of $10,000 to organize the Golden Braid Costume Company (R. 160, 167–168, 1647–1648, 1705). The Company manufactured a costume which was to be used in the ritual of the Mantle Club. The national board of governors of the Mantle Club bought all the costumes manufactured by the Golden Braid Company, a total of more than 50,000 costumes. (R. 230, 232, 1389, 1646.) The total membership of the Mantle Club at its peak was less than 35,000 (R. 1505) and the number of full members, the only ones authorized to wear the costume, was considerably less (R. 758–759, 840–841, 934–935). Many of the garments sold to the Mantle Club never left the warehouse of the Golden Braid Company (R. 233). Of those that were actually delivered, many were kept in cabinets in the offices of local boards of governors, for the national board of governors shipped to various local boards and ordered the local boards to pay for many more costumes than there were members entitled to wear them (R. 756–758, 840–841, 934–935, 971, 1246–1247, 1285–1289, 1718). For example 2,000 garments were sent to the St. Louis unit, and less than 150 were sold to members (R. 756–758).

Mrs. Drew and Mrs. Mason received dividends totalling $77,600 and $17,900, respectively (R. 1791). In the years 1936 to 1940 Mrs. Drew[5]

[5] In 1940, when she married Monjar, Mrs. Drew resigned from the Company and sold her stock (R. 162, 1709).

received a salary of $1,500 per month, for a total of $66,000 (R. 1791).

Other activities.—With P. L. funds Monjar organized the American Business Research Corporation and the American Business Management Corporation, and through Cook and Jones advanced to a number of men close to him money with which to buy stock in these organizations (R. 183–184, 716–721, 1022, 1047, 1521, 1527, 1537–1538, 1549–1550, 1561–1562, 1583). The Research Corporation was supposed to render statistical information, but the only activity in which it engaged was a "survey" of Portland families, material for which was collected on a voluntary basis or by persons working for small compensation (R. 185–188, 219–228, 1684–1694). The results of this survey were for the most part not even examined (R. 206–207), but $24,000 was paid to a company known as the Portland Research Corporation (R. 195). The Research Corporation had a contract with the Golden Braid Company and with the Key Publishing Company under which it was paid $1,000 per year by each of these corporations (R. 196–197). In the latter part of 1942 petitioners Jones, Cook, and Drew turned over to the Research Corporation shares of stock which they owned in the Key Publishing Company, and the Research Corporation sold this stock to the American Distributing Corporation for $40 per share, thus securing funds which, with

its own balance, proved sufficient to enable the Research Corporation to liquidate at 100 cents on the dollar (R. 198–203).

The American Business Management Corporation was supposed to render tax and accounting services to its subscribers, all of which were corporations having Mantle Club or affiliated members, including the Golden Braid Company, the Research Corporation, the American Distributing Corporation, and the Key Publishing Company (R. 136, 163, 1525, 1693–1694). Petitioner John Lindh was manager of the Business Management Corporation (R. 720).

Liquidating trust.—After the first indictment was returned against Monjar and his codefendants in May 1942, petitioners Cook, Maddams, and Candlin constituted themselves a group of trustees and undertook to liquidate the personal loans of Monjar (R. 1039–1040, 1067, 1578–1589). These individuals appointed agents who were to interview members of the Mantle Club who had made loans to Monjar. The agents were given explicit instructions as to procedure (R. 1596–1604). Members were questioned about their loyalty to Monjar. If the person interviewed indicated that he wished the return of his money, the interview would be terminated. If, however, the member expressed loyalty to Monjar he would be given in cash the amount of his loan and asked to sign a receipt therefor. Immediately following he was

asked to contribute to a fund being set up to liquidate the other loans. (R. 1044–1045, 1070, 1072, 1075, 1077, 1596–1604.) In this manner the liquidating trustees were able to obtain receipts showing repayment of about $800,000 of the personal loans (R. 1072–1073). At least some of the persons so "repaid" were under the impression that their donation to the new fund was a means of securing the ultimate return of their original loans (R. 1082, 1211, 1216).

Participation of petitioners.—The participation of the petitioners named in the first indictment (Monjar, Mrs. Monjar, Cook, Jones, and Drew) appears from the summary of the evidence above.

As to those named in the second indictment, they were all, with the exception of Maddams, members of the national board of governors of the Mantle Club from 1940 to the time of the return of the indictment (R. 141, 893). Prior to the expansion of the national board in 1940, all of them had been employed by the board (R. 193, 1022, 1046, 1084, 1309–1310, 1517–1518, 1531, 1542, 1555, 1565, 1627–1628). Admittedly, as members of the board of governors, they all authorized the purchase of 17,072 issues of the American Key Magazine with Mantle Club funds (R. 1519, 1533, 1544, 1557, 1567–1568, 1629) and authorized the expenditure of $100,000 of Mantle Club funds for purchase of costumes in excess of the total net membership of the Club (R. 1522–1523, 1536, 1548,

1559, 1571, 1632).[6] Admittedly, also, all of them knew that Monjar was soliciting personal loans from members (R. 1046, 1063, 1083–1084, 1098, 1520, 1534, 1546, 1558, 1569, 1618–1620, 1630). Petitioners Willard and Cruser had for a time acted as P. L. Agents (R. 1545, 1630). Maddams was employed in the office of the treasurer of the Club (R. 1616). Although paid with Mantle Club funds, he devoted about 50% of his time to keeping P. L. records (R. 1037, 1042–1043, 1731), which were kept in the national offices of the Club (R. 1055, 1101). Cruser also for a time helped Cook prepare P. L. records (R. 1055).

All of these petitioners owned stock in the Key Publishing Company and received dividends thereon (R. 1519, 1533, 1544, 1556, 1566, 1617, 1628). Fitzpatrick and Candlin were employed by the Key Publishing Company and were directors and officers thereof (R. 1556–1557, 1566–1567, 1065). Money was advanced to all of them to buy stock in the American Business Management Corporation and the American Business Research Corporation (R. 1521, 1537–1538, 1549–1550, 1561–1562, 1569, 1573, 1619, 1621, 1634–1635). Lindh was manager of the Business Management Corporation (R. 146). Petitioner Willard was successively vice-president and president, and petitioner Moore

[6] Willard, as the person in charge of ritual, displayed the costumes and gave directions in respect thereto before shipments were made to the local boards (R. 756–758, 1718–1719).

was vice-president, of the Business Research Corporation (A. 229; R. 1538, 1550). The part Candlin and Maddams played in the liquidating trust is set forth *supra*, pp. 22–23. In addition, petitioner Lindh aided in securing stock of the various Monjar corporations for the liquidating trustees (R. 1087, 1529) and petitioner Willard for a short period acted as an interviewer for the trustees (R. 1552–1553). Lindh spoke to a group in Minneapolis who sought information concerning the charges made against Monjar, and refused to discuss the question of dividends paid by the Golden Braid Costume Company because no one present was a stockholder (R. 973–975, 999–1010).

The sums received by each of the petitioners from the Mantle Club and related activities are itemized at R. 1793–1807.

ARGUMENT

1. The petitioners named in the first indictment do not deny that the evidence adduced at the trial established a scheme to defraud and their knowing participation therein. They contend merely (Pet. I, 3–4, 22, 41–53)[7] that the evidence does not establish the particular scheme charged in the indictment and submitted to the jury, in that the indictment charged (A. 20–21, 31) and the judge instructed the jury that they must find "that the

[7] The petition filed by petitioners named in the first indictment is designated as "Pet. I." The other petition is designated as "Pet. II."

scheme to defraud was devised prior to the organization of the Mantle Club, which occurred in 1928" (A. 723). Petitioners argue that there was no proof of fraud in the organization of the Mantle Club and that the evidence of fraud related to the period beginning in 1933, when the Club was expanded.

As the circuit court of appeals pointed out, this charge by the trial judge imposed an "undue burden on the government" (S. A. 194). The gist of the scheme charged in the indictment was the use of the Mantle Club as a means to defraud. Proof that at any time before the mailing of the count letters petitioners planned so to use the Club, would have been sufficient to establish the offenses as alleged. The fraud which petitioners characterize as "subsidiary" (i. e., subsequent to 1933) (Pet. I, 50–51), and which they in effect admit was established by the evidence, did not, as they contend (Pet. I, 50–52), consist of separate fraudulent transactions, unrelated to the main charge. The personal loans, the magazine purchases, the profits from the sale of costumes, all revolved around the Mantle Club and were merely particular manifestations of the basic scheme alleged in the indictment, a scheme to use the Mantle Club as a means of personal aggrandizement.

Even under the judge's charge, however, there is no deficiency in the evidence. Monjar's whole course of action, prior and subsequent to the

establishment of the Mantle Club, shows that he used his ability to organize and lead groups of men as the means of securing funds for his personal use, and justifies a conclusion by the jury that at least Monjar schemed from the start to use the Mantle Club as a device to defraud. We think that the evidence also fully justifies the conclusion that others of the petitioners, such as Cook, Jones, and Drew, who had previously worked with Monjar in the Decimo Club (A. 475–476, 494, 500; R. 1744), who were regarded by him as "tried and trusted" men (A. 456), who refused other positions in order to work with Monjar during the organization period from 1928–1933 (A. 467–469), and who without question promoted and aided the personal loan system when Monjar suggested it in 1934 (*supra*, pp. 14–17), were, from the beginning, knowing participants in a plan to use the Mantle Club to defraud. In any event, all that the jury was required to find, even under the judge's charge, was that a scheme to use the Club to defraud was devised prior to its organization. The judge correctly instructed the jury that "one man or woman may devise and accomplish it [the scheme] without assistance, but all who with criminal intent join themselves to the principal scheme are subject to the statute * * *" (A. 724); that "it is not necessary for the government to prove that all of the defendants were parties to formation of the scheme; all who participate in the scheme with a guilty knowledge thereof are as responsi-

ble as if they had joined it at the time of its formation" (A. 730–731). Since the evidence amply warrants an inference that at least one petitioner, Monjar, had devised the scheme to defraud as far back as 1928, and that the other petitioners convicted on the substantive counts knowingly furthered that scheme before the mailing of the count letters, the jury's verdict is wholly consistent with the theory on which the case was submitted to them.

The petitioners named in the second indictment charging conspiracy challenge the sufficiency of the evidence to establish their knowing participation in the fraud (Pet. II, 2, 7, 12, 13–17). We think that the evidence as set forth *supra*, pp. 23–25, fully established "more than suspicion, more than knowledge, acquiescence, carelessness, indifference, lack of concern;" that it established "informed and interested cooperation." *Direct Sales Co.* v. *United States*, 319 U. S. 703, 713. As to those petitioners (Maddams and Candlin) who participated in the liquidating trust arrangement, *supra*, pp. 22–23, their part in that activity, particularly when considered in conjunction with their other functions (*supra*, pp. 23–25), is sufficient to establish their guilt. As to the others, their actions as members of the national board of governors in ordering magazines and costumes cannot be explained away as mere errors of judgment. These men, as members of the board of governors, oc-

cupied fiduciary positions; the funds which they were handling were not their own. All these men had, prior to their election to the board of governors in 1940, been employed by the national board in capacities which, by their own account of their duties, must have made them aware of prior expenditures in respect of these items (see R. 1309–1310, 1517, 1531–1532, 1542, 1555, 1565, 1628). The jury, therefore, on the evidence, might well have inferred that these petitioners were aiding Monjar rather than exercising independent judgment. Moreover, they, as members of the board, were apparently willing to allow the personal loan records to be kept in the Club's offices and to allow one of their employees (petitioner Maddams) to spend half his time on P. L. activities (see *supra*, p. 24), thus actively assisting in the use of the Club as a means of securing the loans. Of course, the fact that these petitioners may not have been aware of the full extent of the P. L. fraud does not exonerate them from liability for their part in furthering the scheme. *McDonnell* v. *United States*, 19 F. 2d 801, 803 (C. C. A. 1), certiorari denied, 275 U. S. 551; *Galatas* v. *United States*, 80 F. 2d 15, 23 (C. C. A. 8), certiorari denied, 297 U. S. 711; *Craig* v. *United States*, 81 F. 2d 816, 822 (C. C. A. 9), certiorari denied, 298 U. S. 690; *Martin* v. *United States*, 100 F. 2d 490, 495–496 (C. C. A. 10), certiorari denied, 306 U. S. 649. In addition, the

other evidence of their participation in the whole scheme, as set forth in the Statement (*supra*), fully establishes that these petitioners were generally aware of Monjar's activities and knowingly assisted him in consummating them. These petitioners seek to defend their conduct on the basis of their "steadfast adherence to an idolized leader" (Pet. II, 14), but certainly loyalty to one man does not excuse the breach of trust here proved. In this connection, the trial judge charged the jury (A. 739–740):

> * * * If, therefore, you should find that a conspiracy had originally been formed and that certain of the defendants subsequently had done things which were the object of such conspiracy, yet they would not be guilty of this charge unless in addition thereto you find that they consciously, knowingly and corruptly entered into the conspiracy that had originally been formed and that their acts were the result of a joint and corrupt concert of action.
>
> The defendants meet the entire charge contained in the indictment with the assertion and claim upon their part that whatever they did and whatever representations they made, through the mails or otherwise, was done in entire good faith and in the sincere belief in the truth of whatever they asserted to be the fact. This claim on their part, as indicated, unless overcome by the proof adduced in behalf of the gov-

ernment, negatives their guilt of the charge against them.

The jury and two courts have found that these petitioners' guilt was established by the evidence. There is no occasion for further review by this Court. *United States* v. *Johnson,* 319 U. S. 503, 518; *Delancy* v. *United States,* 263 U. S. 586, 589–590.

2. All the petitioners contend (Pet. I, 2–3, 21, 22–30; Pet. II, 3, 12, 17–18) that the communications which form the basis of the Securities Act counts were insufficient to constitute violations of that statute. The question affects only the validity of the fines imposed against petitioner Monjar on such counts, for the other petitioners convicted on those substantive counts of the first indictment received prison sentences thereon to run concurrently with sentences imposed on a mail fraud count (see *supra,* p. 8).[8]

[8] If our interpretation of Section 17 (a), discussed in the text *infra*, is correct, there is of course no problem as to the validity of the convictions under the conspiracy count of the first indictment and under the second indictment. Even assuming that the substantive counts under the Securities Act are vulnerable to attack, it would not follow, as petitioners argue (Pet. I, 30–32; Pet. II, 17–18), that the convictions for conspiracy must be reversed. Under the judge's charge, the jury, in order to find that petitioners conspired to violate the Securities Act, had to find an agreement (1) to defraud, (2) to use the instrumentalities of interstate commerce or the mails in execution of the fraud, and (3) to sell securities (see *infra*). There is no possibility that the jury could have found that the instrumentalities of interstate

The communications were letters and telegrams directed to petitioner Cook, treasurer of the Mantle Club, and were petitioner Drew's or a loan agent's reports of the results of meetings the purpose of which was to sell securities, i. e., the P. L. loans. Enclosed in one letter was a bank draft to cover the amount of cash collected at a meeting (A. 77). The letters from the loan agents indicate that copies were sent to Drew.[9]

Petitioners argue that under Section 17 (a), prohibiting the employment of a scheme to defraud "in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails," the interstate communication or the mailing must be directed to a purchaser and must either be a step in the consummation of a particular sale or so closely related to such a sale as to be deemed a part thereof. We submit that the narrow construction urged by peti-

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commerce were used to the exclusion of the mails, for it is undisputed that P. L. agents regularly transmitted drafts for the money collected on P. L. loans to Cook by mail (see *supra*, p. 17). In finding that petitioners conspired to violate the Securities Act, the jury must therefore have found at least that petitioners conspired to use the mails in execution of a scheme to defraud, and consequently that they conspired to violate the mail fraud statute.

[9] See Count 16—Gov. Ex. 211; R. 859; Count 17—Gov. Ex. 221; R. 928, 929, indicating that a bank draft was attached; Count 18—Gov. Ex. 212; R. 860; Count 20—Gov. Ex. 77; R. 287, 254–255; Count 21—Gov. Ex. 127; R. 596, 601.

tioners is untenable. The title of the Securities Act defines its purpose as "to provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof." (48 Stat. 74.) The Act as a whole makes it plain that Congress intended to exercise the full extent of federal power in order to prevent the instrumentalities of interstate commerce and the mails from being used to perpetrate fraud in the sale of securities. The broad language of Section 17 (a), interdicting the employment of a scheme to defraud "in the sale of any securities by the use of" the mails or instrumentalities of interstate communication, "directly or indirectly," is clearly designed to effectuate this purpose. That language refers, not to particular sales, but to the selling of securities by such means, and cannot be read as limiting the application of the section to communications directly related to the consummation of a sale to a particular purchaser. We think it is clear that the use of the mails and means of interstate communication in furtherance of a plan to bring about a nationwide sale of securities, such as was here proved, constitutes, as the court below held (S. A. 189), use of such instrumentalities in "furtherance of the sale" of securities, within the meaning of the statute. When it is shown that such a plan is part of a scheme to

defraud, all elements of the offense defined by Section 17 (a) have been established.

It should be noted, moreover, that the selling scheme contemplated a continuing relationship with the investors and repeated efforts to induce the investors to make the pledged instalment payments and to increase the amounts of their loans. Thus, the reports of collections and transmission of funds were, in a very real sense, closely related to the particular sales being reported.

The decisions dealing with this question are in accord with this construction of Section 17 (a). *Kopald-Quinn & Co.* v. *United States,* 101 F. 2d 628, 632–633 (C. C. A. 5), certiorari denied, *sub nom. Ricebaum* v. *United States,* 307 U. S. 628; *Pace* v. *United States,* 94 F. 2d 591 (C. C. A. 5).[10] While it is true, as petitioners argue (Pet. I, 29–30), that there are factual differences between those cases and the present one, the decisions, we think, are clearly predicated on the construction given to the statute by the court below.

Petitioners contend (Pet. I, 25, 28–30) that, even if the circuit court of appeals' interpretation of the statute is correct, the verdict on the Securities Act counts cannot stand because the trial judge charged the jury that petitioners could be convicted

[10] In the *Pace* case, the nature of the mailings does not appear from the opinion but two counts were based on letters merely expressing thanks for orders for stock given to salesmen.

on those counts if the mails or interstate communications were used in execution of a scheme to defraud involving the sale of securities, rather than that such communications must be in furtherance of the sale. In point of fact, the court instructed the jury that the sales of the securities must have been made in connection with the use of the mails or instruments of interstate communication (A. 733). In any event, under the facts of this case, the plan to sell the securities and the scheme to defraud in so far as it involved the sale of the securities, were one and the same. Hence, mailings and interstate communications which furthered the fraud necessarily furthered the sale of the securities. There is here no problem, as there was in *Kann* v. *United States,* 323 U. S. 88, upon which petitioners rely (Pet. I, 28), as to whether the use of the mails was in execution of the scheme, for it is clear that the scheme had not "reached fruition" and that the communications in question were in furtherance of a continuing scheme to sell F. L. loans and to collect payments on such loans on an instalment basis.

3. There is no merit in petitioners' contention (Pet. I, 3, 22, 33–35; Pet. II, 3, 13, 18) that the trial judge improperly withdrew from the jury the question whether receipts for monies paid on accounts of the personal loans to Monjar constituted securities as defined by Section 2 (1)

of the Securities Act.[11] The trial judge read the statutory definition stated that the term, "security" includes an evidence of indebtedness and an investment contract, defined "investment contract" (A. 732–733), and, subsequently, instructed the jury as follows (A. 733–734):

> * * * The question you must decide is whether the PL and CD loans, constituting a sale of securities as the terms "sale" and "security" are defined in the Act, were made in connection with the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails; and that such sale of PL and CD loans were the result of the employment of a scheme or artifice to defraud on the part of these defendants. You must find, in order to convict under these counts, that the defendants received money from these loans and that the victims were told that the money was to be used, I quote, "to organize business concerns which would operate for the benefit of the persons making the loans." And you must also find that the money was paid over by the members with the expectation that the return to be obtained would give to such "worthy men" financial independence.

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[11] As explained at p. 31, *supra*, this contention affects only the validity of the fines imposed against Monjar on the Securities Act counts.

If this charge, to which there was no exception (Pet. I, 35), is subject to criticism, it should be on the ground that it was unduly favorable to petitioners. Accepting the interpretation of the P. L. transactions most favorable to petitioners, it is undisputed that P. L. funds were given to Monjar as a loan. True, the loan was to be repaid at Monjar's convenience, but nevertheless the money was given as a loan and not as a gift. Hence the receipt for the money was, on the undisputed evidence, an evidence of indebtedness within the definition of the statute, and the judge could properly have instructed the jury that, as a matter of law, the receipts were securities within the meaning of the Act. Cf. *Blumenthal* v. *United States,* 88 F. 2d 522, 528 (C. C. A. 8). However, the judge actually required the jury to find facts which would also establish that the receipts were investment contracts before they could convict under the Securities Act counts. The jury was instructed that petitioners could be convicted on these counts only if the victims were told that the money was to be used to organize business concerns which would operate for the benefit of the lenders and that the money was paid with the expectation that the returns would give them financial independence. The jury therefore had to find that the loans were moneys entrusted to another with the expectation of deriving a benefit or income therefrom, i. e., an investment contract. *S. E. C.* v. *Universal Service Association,* 106 F. 2d 232, 237 (C. C. A. 7), certiorari denied, 308

U. S. 622; *S. E. C.* v. *Bailey*, 41 F. Supp. 647, 651 (S. D. Fla.); *S. E. C.* v. *Payne*, 35 F. Supp. 873, 879 (S. D. N. Y.); see *S. E. C.* v. *Joiner Corp.*, 320 U. S. 344.[12]

4. The Government offered in evidence statements given by a number of the petitioners to a special agent of the Internal Revenue Bureau (R. 1642–1758). The agent who obtained these statements testified that he had permission from the Internal Revenue Bureau voluntarily to produce the records of these statements on condition that he disclose in open court the circumstances under which the statements were obtained, i. e., that, in a conference with the attorney for the Mantle Club and Monjar personally, he had told them, "in return for the complete cooperation of the Club officials, that I would not cooperate in the S. E. C. investigation then in progress" (R. 611). He testified, both in open court and at a hearing outside the presence of the jury, that he had not cooperated with the S. E. C. or with any other government department investigating the Mantle Club (R. 611, 614, 628). The district court held that the statements were ad-

[12] The indictment alleged "the sale of a security, to wit, a certain evidence of indebtedness * * *" (e. g., A. 75). That the security was shown also to be an investment contract or even to be only an investment contract would constitute an immaterial variance. See *Berger* v. *United States*, 295 U. S. 78, 81; *Westmoreland* v. *United States*, 155 U. S. 545, 549; *McIntosh* v. *United States*, 1 F. 2d 427, 428 (C. C. A. 7).

missible in evidence (A. 216–220) and the circuit court of appeals, after petitioners' application for rehearing was filed, amended its opinion to include a holding that such admission was proper (S. A. 228–229). Petitioners contend (Pet. I, 3, 22, 35–41; Pet. II, 3, 13, 19) that these statements were confessions of guilt obtained by inducement of reward and therefore inadmissible in evidence under the decision of this Court in *Bram* v. *United States,* 168 U. S. 532. There is no merit in this contention. The statements were not confessions of guilt; they were merely admissions of fact from which, together with the other evidence adduced at the trial, guilt might be inferred. Nowhere in any of the statements did any of the petitioners acknowledge the element which is necessary to give the color of guilt to their admitted acts—the intent to defraud. Cf. *Ercoli* v. *United States,* 131 F. 2d 354, 356 (App. D. C.); *Rand* v. *United States,* 45 F. 2d 947, 949 (C. C. A. 3).

Furthermore, the circumstances under which the statements here involved were obtained are very different from those established in the *Bram* case. That case does not hold, as petitioners contend (Pet. I, 39), that a confession, "even if voluntary," may not be offered in evidence if shown to have been induced by promises. The decision in the *Bram* case turned on the fact that this Court found that, in all the circumstances, the confession there involved was not voluntary.

Bram, accused by the investigating officers of murder, while being stripped of his clothing,[13] made the statements which were offered as a confession, and this Court held that the circumstances refuted "any possible implication that his reply to the detective could have been the result of a purely voluntary mental action." 168 U. S. at p. 562; see also pp. 563–564. Petitioners' statements in the present case were made during the course of an investigation not related to the crimes for which they were subsequently tried. Petitioners made the statements after having had an opportunity to consult with counsel, after being informed of their constitutional rights, and, except in the case of Willard, with counsel present (R. 1642, 1670, 1678, 1704, 1736, 1742). Clearly the promise not to cooperate with the S. E. C. investigation was not the kind of hope or inducement of reward which would lead a person questioned under circumstances under which these petitioners were examined, falsely to accuse himself. There is therefore no basis for holding petitioners' statements inadmissible in evidence.

CONCLUSION

The case was correctly decided below and presents no conflict of decisions. We therefore re-

[13] This Court thought that factor sufficiently important to italicize its statement of such fact. 168 U. S. at p. 561. See *United States* v. *Lonardo*, 67 F. 2d 883, 885 (C. C. A. 2).

spectfully submit that the petitions for writs of certiorari should be denied.

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